

Sheri M. Thome, Esq.
Nevada Bar No. 008657
James T. Tucker, Esq.
Nevada Bar No. 012507
Cara T. Laursen, Esq.
Nevada Bar No. 014563
WILSON ELSE MOSKOWITZ EDELMAN & DICKER LLP
300 South 4th Street - 11th Floor
Las Vegas, NV 89101-6014
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Sheri.Thome@wilsonelser.com
James.Tucker@wilsonelser.com
CaraT.Laursen@wilsonelser.com
Attorneys for Defendants The State of Nevada, ex rel.
its Department of Corrections

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONALD WALDEN, JR., et al., etc.,

Plaintiffs,

v.

THE STATE OF NEVADA, EX REL. NEVADA
DEPARTMENT OF CORRECTIONS, and
DOES 1-50,

Defendants.

CASE NO: 3:14-cv-00320-MMD-WGC

**DEFENDANT STATE OF NEVADA *EX REL.* DEPARTMENT OF CORRECTIONS'
MOTION FOR SUMMARY JUDGMENT
ON THE MERITS OF PLAINTIFFS' FLSA
CLAIMS**

Defendant The State of Nevada, *ex rel.* Nevada Department of Corrections ("NDOC"), by and through undersigned counsel, moves for summary judgment on the merits of Plaintiffs' claims under the Fair Labor Standards Act ("FLSA").¹

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

That the FLSA does not require omniscience on the employer's part is firmly entrenched in Ninth Circuit precedent. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981). But, that is what Plaintiffs' FLSA theory requires this Court to accept.

¹ NDOC respectfully submits that the Court need not even reach the merits of Plaintiffs' FLSA claims, which are barred by Nevada's sovereign immunity under the authority of *Allen v. Cooper*, 2020 U.S. LEXIS 1909 (Mar. 24, 2020) (No. 18-877), *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

1 “Every day is different...[e]very different post is different.”² These same plaintiffs testified
 2 that, regardless of post, the time it took to complete even common tasks such as getting through
 3 operations could take mere seconds depending on the day.³ NDOC has no way of knowing *ex ante*
 4 on any particular day that a particular plaintiff may work overtime compensable under the FLSA.
 5 Plaintiffs’ act of discarding NDOC’s administrative rules and procedures for reporting overtime bars
 6 Plaintiffs’ FLSA claims under *Forrester, supra*.

7 NDOC also did not sit idly by and accept uncompensated work. Plaintiffs’ sworn testimony
 8 confirms that NDOC affirmatively paid for all overtime requested by Plaintiffs. Plaintiffs cannot,
 9 under *Forrester*, build an FLSA case in an infinitely variable work environment by violating
 10 NDOC’s policies and procedures by failing to accurately and timely report the hours they claimed
 11 they worked, including any alleged overtime, in violation of NDOC’s policies and procedures.

12 Accordingly, NDOC is entitled to summary judgment on Plaintiffs’ FLSA claims, which are
 13 barred by *Forrester* and its progeny. Those claims should be dismissed with prejudice.

14 **II. Statement of Undisputed Facts**

15 **A. NDOC’s comprehensive regulatory and administrative system for overtime**

16 1. The State of Nevada has a comprehensive regulatory and administrative system in
 17 place for overtime and overtime alternatives at NDOC. *See, e.g.*, Ex. K, A.R. 320; Ex. L, Variable
 18 Work Schedule Request; Ex. M, Election of Compensatory Time; Ex. Q, A.R. 326; Ex. S,
 19 Documents Acknowledging Overtime Requirements; Ex. T, State of Nevada Employee Handbook
 20 Excerpts; Ex. GG, A.R. 322.

21 2. The overarching principle guiding the use of overtime within NDOC is for Wardens
 22 and Facility Managers “to ensure there is sufficient staff on duty to safely operate their institutions
 23 and facilities.” [Ex. Q, A.R. 326.] Thus, the safety of the public, the inmates, and Corrections
 24 employees drives overtime decisions. [*See id.*]

26
 27 ² Exhibit HH Testimony of Plaintiff, Francisco Bautista at 31:8-18.

28 ³ Exhibit O Testimony of Plaintiff, Timothy Carlman, at 88:18-89:5.

3. One of the essential functions of the Correctional Officer position is that “Extended hours may be required on short notice.” [Ex. R, Correctional Officer Position Essential Functions; *see also* Ex. K, A.R. 320.01(4) (“As a condition of employment, employees may be required to work overtime as required by a supervisor and as stated in AR 326, Posting of Shifts/Overtime.”); Ex. Q, A.R. 326.03(6) (“If overtime is required to maintain a safe and secure operation and insufficient staff voluntarily agrees to work, mandatory overtime will be initiated.”).]

4. Every Corrections employee, including each Plaintiff, is required to sign an acknowledgment that one of the essential functions of their position is that “Extended hours may be required on short notice.” [See Ex. S, Documents Acknowledging A.R. 320, at Table (summarizing documents attached to Ex. S that include the Plaintiffs’ signed acknowledgments, such as the acknowledgment of Aaron Dicus at D002326).]⁴

5. “Overtime must be authorized by the Director, appropriate Deputy Director, Division Head, Warden, or their designees.” [Ex. K, A.R. 320.01(1).]

B. NDOC Employee Requirements for Accurately Reporting Overtime

6. Each Plaintiff is responsible for truthfully reporting the time they work, including all overtime. Specifically, “an employee shall provide an accurate accounting of the hours worked and leave used during a pay period in the NEATS Timekeeping System (“NEATS”), to include the specific times at which their shift starts and ends and regular days off.” [Ex. Q, A.R. 326.06(1).]

7. NDOC’S pay reporting is an “exception” reporting system. NEATS assumes that an employee has worked all hours in their scheduled shift, unless the employee has reported an exception. “Requests for Overtime must be submitted and approved on the Authorization for Leave and Overtime Request Form DOC-1000 or in NEATS as directed by the Human Resource Administrator.” [Ex. GG, A.R. 322.08(2).]

⁴ For the sake of brevity in light of the voluminous record, examples of documentation by Plaintiffs that they have received, read, and understand NDOC’s overtime requirements are provided from the personnel file of Aaron Dicus. A table summarizing the documentation for all of the Plaintiffs is provided in a Table at the beginning of Exhibit S, and is followed by the actual documentation for each of the Plaintiffs.

1 8. If there is an exception because of overtime for a non-exempt employee, that
2 employee “must document this time on an Authorization for Leave and Overtime Request form
3 (DOC-1000).” [Ex. K, A.R. 320.01(2).]

4 9. Employee exceptions are reported on timesheets, which the employee is required to
5 input and submit into NEATS “at the conclusion of each reporting cycle (pay period) no later than
6 12 PM, Wednesday, of the non-pay week for each pay period.” [Ex. Q, A.R. 326.06(4).]

7 10. Employees are subject to discipline under A.R. 339 if they falsify their timesheets.
8 [See Ex. Q, A.R. 326.06(6).]

9 **C. Overtime Eligibility depends on if a Plaintiff is on a Variable Schedule or has**
10 **elected to Accept Compensatory Time in Lieu of Overtime Wages**

11 11. Eligibility for overtime for a particular shift depends on whether the employee has
12 opted to work a standard workweek or a variable (innovative) work schedule using either a 40-hour
13 or 80-hour variable. [See Ex. K, A.R. 320.01(5)-(6).]

14 12. Employees who work a standard workweek are eligible for overtime if they work
15 more than eight hours in one calendar day. [*Id.* at A.R. 320.01(5).]

16 13. Employees working a variable (or innovative) work schedule “do not accrue overtime
17 until either (1) they have worked the 41st hour if they signed a 40-hour variable agreement or (2)
18 they have worked the 81st hour, if they have signed the 80-hour variable agreement.” [*Id.* at A.R.
19 320.01(6); *see also* Ex. L, Variable Work Schedule Request.]

20 14. Overtime eligibility also can depend on whether a particular employee has elected to
21 accrue up to 120 hours of compensatory time off in lieu of a cash payment pursuant to 29 C.F.R. §
22 553.23. [See Ex. M, Election of Compensatory Time.]

23 15. Exhibit N demonstrates the many variations in work schedule and compensatory time
24 choices among just the seven named Plaintiffs:

25 ///

26 ///

27 ///

Plaintiff	Type of Variable Work Schedule That Plaintiff Opted			Compensatory Time Opted in lieu of Cash under 29 C.F.R. § 553.23		
	40 hours	80 hours	Both	Yes	No	Both
Aaron Dicus		X		X		
Nathan Echeverria			X			X
Brent Everist			X			X
Timothy Ridenour			X	X		
Daniel Tracy			X			X
Donald Walden, Jr.			X	X		
Travis Zufelt		X			X	

16. Although all seven named Plaintiffs worked a variable (innovative) schedule, just two, Plaintiffs Dicus and Zufelt, used the same type of variable work schedule throughout their employment; the remaining five named Plaintiffs (Echeverria, Everist, Ridenour, Tracy, and Walden) switched between the 40-variable and 80-variable schedules multiple times. [See Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

17. Three of the named Plaintiffs (Dicus, Ridenour, and Walden) opted to receive compensatory time throughout their employment and three (Echeverria, Everist, and Tracy) switched between the options one or more times. Only one named Plaintiff (Zufelt) opted not to participate. [See Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

18. Even if claimed time is compensable, Plaintiffs may not be entitled to any overtime payments depending on their work schedule arrangement. [See Ex. K, A.R. 320.01; Ex. L, Variable Work Schedule Request; Ex. M, Election of Compensatory Time; Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time.]

D. Plaintiffs' Acknowledgments of Receiving, Reading, and Understanding the Requirements for Overtime and How to Request it

19. Each one of the Plaintiffs has acknowledged on multiple occasions that they received, read, and understood these procedures for when they are eligible for overtime and how to report it. [See Ex. S, Documents Acknowledging Overtime Requirements.]

20. At the time of hire, a New Employee Checklist was completed for each Plaintiff to include going over the Administrative Regulations. [See Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002324 (Dicus example).]

21. Plaintiffs initialed that they had received and reviewed the State of Nevada Employee Handbook, which includes a summary of the policy requiring accurate reporting of all hours and overtime worked. [See Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002336 (Dicus example); Ex. T, State of Nevada Employee Handbook Excerpts.]

22. Although NDOC has no records indicating that two of the named Plaintiffs, Walden and Zufelt, initialed receiving and reviewing the Handbook, all of the Plaintiffs including Walden and Zufelt acknowledged receiving, reviewing and understanding NDOC's overtime requirements and procedures through other documents. [See Ex. S, Documents Acknowledging Overtime Requirements.] The Handbook also is available on the Internet from Human Resources at http://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Publications/Employee_Handbook.pdf.

23. On one or more occasions, Plaintiffs signed and dated an Administrative Regulations Acknowledgment in which they acknowledged, "It is my responsibility to read and familiarize myself" with regulations including A.R. 320 and A.R. 339. [See Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002303, D002335, D002376 (Dicus examples).]

24. Throughout their employment, on multiple occasions, each Plaintiff signed and dated the Employee Work Performance Standards Form for their position including Element #3, which provides that they "Have proficient knowledge of A.R.'s, I.P.'s and Administrative Directives." [See Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002305-2307, D002321-2323, D002439-2441 (Dicus examples).]

25. Every time each of the Plaintiffs received their written appraisal, they again acknowledged and were rated on whether they had proficient knowledge of the Administrative Regulations, including those pertaining to accurately reporting overtime.⁵

E. Plaintiffs Request and Receive Compensatory Time When They Work Longer Than Scheduled

26. Plaintiffs who opt into the program receive compensatory time, or "comp time," in

⁵ See Ex. S, Documents Acknowledging Overtime Requirements, Table; *see also* D002259-2260, D002261-2264, D00269-2272, D002403-2406, D002407-2410, D002411-2414, D002415-2418, D002419-2422, D002423-2426, D002427-2430, D002431-2434, D002435-2438 (Dicus examples).

1 lieu of overtime wages.⁶

2 27. Compensatory time works both ways. When employees leave early, they do not
3 notate that on their time report and are still paid for their full shift.⁷

4 28. Supervisors rely upon employees to tell them the amount of comp time to which they
5 believe they are entitled for working longer than their scheduled shift. Paul Kluever's supervisors
6 took him at his word on his "guesstimate" of how much comp time he was owed. [Ex. II, Kluever
7 Dep., 68:23-69:5.]

8 29. Jason Hanski explained, "... There have been times where I was relieved late and
9 maybe 15 to 20 minutes late and talked to my supervisor directly. Now, when I say this, this is
10 something that happened a few good years ago, and the supervisor would say, oh, okay, I'll tell you
11 what ... I'll let you go 15 or 20 minutes early in exchange for that." [Ex. JJ, Hanski Dep., 125:22-
12 126:3.]

13 **F. Plaintiffs Were Paid Overtime When They Were Eligible and They Complied**
14 **with NDOC's Reporting Requirements**

15 30. Nearly all of the Plaintiffs took advantage of overtime opportunities. Payroll data for
16 563 NDOC employees for the period of 12/31/2007 to 2/15/2016 was analyzed and compared with
17 timekeeping data entered into NEATS. [See Ex. F, Crandall Decl. ¶ 7.] "Of the 555 Correctional
18 Officers in the data, 529 or over 95% recorded some overtime totaling 125,726.9 hours." [Id. at ¶
19 32.]

20 31. According to that analysis, "the average total Overtime hours recorded was 226.5
21 hours," with the top three officers each reporting more than 2200 hours. [Id.] The average total
22 dollars paid in overtime was \$7,746. [Id. at ¶ 33.] "Across all [Correction Officer] periods,
23 overtime was recorded on 10,904 of the 51,959 pay periods or 21.0%." [Id. at ¶ 34.] Every NDOC
24 facility paid overtime. [Id. at ¶ 36.] The reasons for the overtime varied considerably between
25

26 ⁶ See Exhibit N, Variations in Plaintiffs Work Schedules and Compensatory Time (identifying which of the seven named
27 Plaintiffs have opted to receive compensatory time).

28 ⁷ Ex. KK, Banks Dep., 54:24-55:19; Ex. HH, Bautista Dep., 26:18-25; Ex. P, Riggs Dep., 31:21-32:14.

1 facilities and employees. [*See id.* at ¶¶ 37-39.]

2 32. All seven of the named Plaintiffs were paid overtime, as shown by each Plaintiff's
3 Employee Paycheck Analysis.⁸

4 33. All of the opt-in Plaintiffs who were deposed likewise were paid overtime.⁹ When
5 they complied with A.R. 320.01(2) by submitting an Authorization for Leave and Overtime Request
6 Form ("Form DOC-1000"), their requests were approved and they were paid for that overtime.¹⁰

7 34. For example, on May 20, 2014, Plaintiff Echeverria completed a Form DOC-1000
8 requesting one quarter hour of leave after he apparently worked 15 minutes past his scheduled shift
9 ending at 1:00 p.m. His request for overtime was approved. [Ex. F, Nathan Echeverria Employee
10 Personnel File, D002741.]

11 35. Similarly, "Plaintiff Walden received 15 minutes of Overtime on November 26, 2010
12 and the timesheet note associated with the entry was 'HOLIDAY WORKED 15 MINUTES OF
13 OVERTIME FOR BEING RELIEVED LATE.'" [Ex. F, Crandall Decl. at ¶ 31.]

14 36. Likewise, Plaintiffs Everist,¹¹ Ridenour,¹² and Tracy¹³ were approved for multiple
15 instances of overtime after submitting their Form DOC-1000s.

16
17
18 ⁸ *See* State of Nevada Human Resources Data Warehouse, Employee Paycheck Analysis, Ex. U, D204-209 (Dicus); Ex.
19 V, D390-396 (Echeverria); Ex. W, Brent Everist Employee Personnel File, D685-691 (Everist); Ex. X, Timothy
20 Ridenour Employee Personnel File, D937-942 (Ridenour); Ex. Y, Daniel Tracy Employee Personnel File, D1177-1191
(Tracy); Ex. Z, Donald Walden, Jr. Employee Personnel File, D1438-1445 (Walden); Ex. AA, Travis Zufelt Employee
Personnel File, D1797-1801 (Zufelt).

21 ⁹ *See* Ex. BB, State of Nevada Human Resources Data Warehouse, Employee Paycheck Analysis, D007386-007395
22 (Tynning), D007406-007415 (Valdez), D005676-005684 (Arias), D005695-005703 (Arnold), D005968-005975
(Carlman), D006145-6152 (Day), D006586-006595 (Jones), D006656-006659 (Krol), D006660-006669 (Lai),
23 D006680-006687 (Ledingham), D006889-006898 (Natali), D007029-007037 (Radke), D007240-007249 (Shultz),
D009645-009654 (Tremblay), D007656-007664 (Allen), D008421-008429 (Hanski), D008678-008688 (Kluever),
D008796-008806 (Maguire), D009283-009288 (Riggs), D009317-009322 (Rocho).

24 ¹⁰ *See* Ex. JJ, Hanski Dep., 68:15-69:8; Ex. MM, Jones Dep. 44:3-10; Ex. NN, Lai Dep., 24:24-25:2, 29:24-30:7, 34:6-
25 15; Ex. OO, Ledingham Dep., 58:18-59:7; Ex. PP, Ridenour Dep., 44:25-45:14; Ex. P, Riggs Dep., 84:24-85:4, 97:11-
16; Ex. QQ, Rocho Dep., 37:12-14; Ex. RR, Tremblay Dep., 37:12-24; Ex. SS, Tynning Dep., 27:3-6.

26 ¹¹ *See* Ex. CC, D2989-3013, 3021-3022, 3025, 3028-3029, 3035, 3039-3042, 3051-3052, 3057, 3069.

27 ¹² *See* Ex. DD, D3239, 3411-3414.

28 ¹³ *See* Ex. EE, D3774-3776.

37. What is particularly notable about the NEATS data is that over ten percent of the segments recorded by Correctional Officers represented “time at or below an hour in duration,” showing that even overtime of short duration was recorded. [Ex. F, Crandall Decl. at ¶ 40.]

G. Supervisors Put in Some Overtime Requests for Plaintiffs

38. Supervisors prepare some overtime requests for Plaintiffs as part of their reports, such as when Corrections Officers have to respond to security incidents that extend their shift.¹⁴

39. Andre Natali testified, “And if you respond to [a security] incident everybody’s name has to be taken down, whoever comes into the incident area, whoever leaves, what inmates were involved, the location, the time, and the place. All that stuff is put into reports. And generally I would come back to work that night and have one waiting for me. I didn’t even have to request it.... [A] DOC-1000.” [Ex. FF, Natali Dep. 41:3-12.]

H. Plaintiffs Are Paid Overtime or Comp Time When They Request It

40. Plaintiffs consistently are paid overtime or given comp time when they request it.¹⁵

41. Donald Riggs “always got paid for my time. Sometimes you were offered time off in lieu of being paid ... I always got my overtime.... I would file the Doc 1000 and turn it in to my supervisor.... *I have never seen a form that I turned in rejected.*” [Ex. P, Riggs Dep., 31:13-20, 33:5-15 (emphasis added); *see also id.* at 84:24-85:4 (same).]

42. Jan Shultz admitted, “*Whenever I asked for it, I would get it.*” There has never been an occasion when he requested it and did not receive it. [Shultz Dep., 46:14-16 (emphasis added).]

43. Andre Natali’s testimony highlights the absence of any unified policy or practice by NDOC to deny Correctional Officers overtime:

Q: ...Have you ever requested overtime pay or comp time for that time [when your relief is late]?

¹⁴ See, e.g., Ex. O, Carlman Dep., 18:24-19:9; Ex. II, Kluever Dep., 62:7-17; Ex. OO, Ledingham Dep., 40:18-41:17; Ex. FF, Natali Dep. 41:3-12; Ex. TT, Radke Dep., 58:8-59:6; Ex. QQ, Rocho Dep., 32:6-11; Ex. UU, Shultz Dep., 43:12-18; Ex. VV, Tracy Dep. 69:16-18.

¹⁵ See, e.g., Ex. WW, Arnold Dep. 49:3-7; Ex. KK, Banks Dep., 45:2-14; Ex. JJ, Hanski Dep., 120:13-122:7; Ex. GG, Jones Dep., 88:2-9; Ex. II, Kluever Dep., 59:16-60:13, 61:3-24, 62:25-63:7; Ex. NN, Lai Dep., 25:13-26:3; Ex. OO, Ledingham Dep., 59:3-7; Ex. SS, Tynning Dep., 44:3-17, 45:20-46:1.

1 A: Sure.

2 Q: And have you been paid for it or given comp time for it?

3 A: *I would have to tell you that 99 percent of the times, yes, I was.* There was
4 only a couple of times that I caught attitude from somebody. I was like, you know
5 what, I don't feel like arguing with you about it so I would have to say it's, yes, I
6 have been when I requested it, yes. [Ex. FF, Natali Dep., 62:1-11 (emphasis added).]

7 **I. Plaintiffs have not submitted requests for most overtime they claim to be owed**

8 44. The Plaintiffs' sworn testimony establishes that in the overwhelming majority of the
9 instances in which they allege that they have not been paid overtime or other compensation they
10 claim they are owed, it is because they did not follow NDOC's policies and procedures and submit
11 an overtime request on a DOC-1000.

12 45. Plaintiffs have not submitted overtime requests to NDOC for the activities for which
13 they are seeking compensation in this litigation.¹⁶

14 46. Many of the Plaintiffs have not applied for overtime for responding to security
15 incidents when their supervisor does not do it for them.¹⁷

16 47. Similarly, many of the Plaintiffs have not applied for overtime for being relieved
17 late,¹⁸ with some Plaintiffs like Timothy Carlman admitting they have never reported it to their
18 supervisors.¹⁹

19
20 ¹⁶ See, e.g., Ex. XX, Allen Dep., 27:19-24, 36:17-37:4; Ex. YY, Arias Dep., 29:20-31:17; Ex. KK, Banks Dep., 17:23-
21 25, 18:19-22, 19:2-12, 41:9-22; Ex. ZZ, Baros Dep., 44:6-13, 57:18-58:1; Ex. HH, Bautista Dep., 26:18-27:7, 56:13-20;
22 Ex. O, Carlman Dep., 17:5-14, 19:23-20:4; Ex. AAA, Day Dep., 28:2-10; Ex. BBB, Dicus Dep., 39:4-9; Ex. CCC,
23 Echeverria Dep., 41:14-17, 43:3-6; Ex. JJ, Hanski Dep., 69:13-16, 122:21-123:13; Ex. MM, Jones Dep., 31:25-32:2; Ex.
24 II, Kluever Dep., 64:1-5; Ex. DDD, Krol Dep., 36:5-6; Ex. NN, Lai Dep., 22:6-13, 23:8-15, 24:10-16; Ex. OO,
Ledingham Dep., 26:20-27:3, 30:2-9; Ex. FF, Natali Dep. 18:15-17, 23:4-6, 60:14-17, 72:9-25; Ex. TT, Radke Dep.,
24:21-23, 36:15-37:3, 44:8-25, 47:9-18; Ex. PP, Ridenour Dep., 35:6-13; Ex. QQ, Rocho Dep., 16:4-6, 19:6-7; Ex. VV,
Tracy Dep., 48:4-8; Ex. RR, Tremblay Dep., 28:17-24; Ex. SS, Tynning Dep., 19:19-20:1, 20:6-8, 25:14-17; Ex. EEE,
Walden Dep., 44:24-45:10, 47:17-18; Ex. FFF, Zufelt Dep., 51:6-21.

25 ¹⁷ See, e.g., Ex. ZZ, Baros Dep., 26:2-22, 27:23-28:13, 36:12-37:8; Ex. HH, Bautista Dep., 24:24-25:5; Ex. O, Carlman
26 Dep., 25:24-26:15; Ex. BBB, Dicus Dep., 45:22-46:14; Ex. DDD, Krol Dep., 29:8-12; Ex. OO, Ledingham Dep., 42:2-4;
Ex. QQ, Rocho Dep., 26:12-14; Ex. UU, Shultz Dep., 43:8-23; Ex. GGG, Valdez Dep., 30:20-31:35; Ex. FFF, Zufelt
Dep., 50:15-51:21.

27 ¹⁸ See, e.g., Ex. XX, Allen Dep., 36:17-37:4; Ex. YY, Arias Dep., 29:20-30:19; Ex. ZZ, Baros Dep., 57:18-58:1; Ex. O,
28 Carlman Dep., 19:23-20:1, 40:10-41:7; Ex. DDD, Krol Dep., 36:2-4; Ex. FF, Natali Dep., 60:14-17.

J. Plaintiffs have not complied with administrative procedures for appealing any overtime requests they have made that have been denied

48. Administrative law governs the rate of overtime pay for NDOC employees. [See NAC 284.250(1).]

49. Nevada has an administrative procedure for addressing state employee “grievances,” a term which includes “any condition arising out of the relationship between an employer and an employee, including, but not limited to, compensation...” [NAC 284.658(2).]

50. Under Nevada law, employees must grieve their compensation dispute with their supervisor (NAC 284.678), then to the head of that employee’s department (NAC 284.686), then to the highest administrative level (NAC 284.690), and finally to the State of Nevada’s Employee-Management Committee (NAC 284.695). Nevada specifically adopted this multi-level grievance procedure, which is unlike the FLSA, precisely to avoid lawsuits over compensation of the very kind that the Plaintiffs have asserted in this matter.

51. Plaintiffs admit that they have not followed the procedure for appealing overtime decisions by speaking to their supervisor or other managers in their chain-of-command or by filing a grievance.²⁰

52. Travis Zufelt illustrates the point. He admitted that he was able to obtain overtime compensation by speaking with his supervisor after one request was initially denied:

Q: Do you remember what you’ve requested overtime for?....

A: I – right now I work overtime just about every day, so I fill out – put NDOC-1000s every day just about right now.

Q: So you know the process pretty well –

A: Yes, sir.

Q: ... And what’s that process? You just fill out the ... DOC-1000?

A: Fill out the DOC-1000. Take it to have a supervisor sign it. Get a copy of it.

¹⁹ Ex. O, Carlman Dep., 19:23-20:1, 40:10-41:7.

²⁰ See, e.g., Ex. YY, Arias Dep., 31:2-23, 59:7-9; Ex. JJ, Hanski Dep., 123:18-124:1; Ex. II, Kluever Dep., 74:1-3; Ex. FF, Natali Dep., at 22:1-3; Ex. P, Riggs Dep., 88:6-8; Ex. PP, Ridenour Dep., 49:18-20; Ex. RR, Tremblay Dep., 37:22-39:1; Valdez Dep., 33:18-20, 47:5013; Ex. EEE, Walden Dep., 46:13-47:8, 79:25-80:5, 88:19-21.

Put that copy in payroll's box. And out one in your box.

Q: Okay. Have you ever had an overtime request denied?

A: *It was denied at first, but after I argued with the supervisor of why I wanted the overtime, then it wasn't....* So, yes, it was – denied it once. [Zufelt Dep., 118:1-119:3 (emphasis added)]

53. Nevertheless, for subsequent overtime or other compensation issues, Zufelt admitted that he has not spoken about them with the Assistant Warden, or AWO. [Ex. FFF, Zufelt Dep., 131:25-132:2.] He also has not filed a grievance over any concerns he has with his compensation or overtime. [*Id.* at 60:17-21, 141:17-19.]

54. The decision of these individuals not to comply with A.R. 320.01(2) by requesting overtime or compensatory time, or to appeal any request that is denied pursuant to NAC Chapter 284 is typical of the evidence before the Court at this time.

III. Legal Analysis

A. Plaintiffs failed to report claimed overtime to NDOC contrary to the procedures they acknowledged receiving, barring their FLSA claims under *Forrester*

“An employee seeking to recover unpaid minimum wages or overtime under the FLSA ‘has the burden of proving that he performed work for which he was not properly compensated.’” *Brock v. Seto*, 790 F.2d 1446, 1447-48 (9th Cir. 1986) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). To establish a claim for uncompensated wages or overtime, Plaintiffs must demonstrate: (1) that they worked regular or overtime hours without compensation; (2) the amount and extent of the work as a matter of just and reasonable inference; and (3) that their employer “suffered” or “permitted” them to work uncompensated. *See* 29 U.S.C. § 203(g); *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984).

NDOC moves for summary judgment on the third element of Plaintiffs’ prima face case.²¹ Plaintiffs’ claims are barred under the controlling authority of *Forrester v. Roth’s I.G.A. Foodliner, Inc.*, 646 F.2d at 413, by their own admissions that they violated NDOC’s comprehensive policies

²¹ In moving for summary judgment on the third element NDOC does not concede Plaintiffs have established the first two elements, which are not material to the instant Motion.

1 and procedures by failing to accurately and timely report the hours they claimed they worked,
2 including any alleged overtime.

3 **1. *Forrester* and its progeny bar FLSA recovery for employees like Plaintiffs**
4 **who fail to report their time worked to their employer**

5 In *Forrester*, the employer required all of its employees to report overtime on time sheets.
6 *Id.* at 414. The plaintiff knew about the policy and that he was routinely paid all time that he
7 reported to his employer on the timesheets. *Id.* The plaintiff admitted that he had been paid for all
8 of the overtime he had claimed on his timesheets. *Id.* He also acknowledged that he would have
9 been paid all of the overtime that he was seeking in his lawsuit if he had submitted it to his
10 employer. *Id.* Nevertheless, the plaintiff testified in his depositions that he “did not mention any
11 unpaid overtime to any store official prior to filing his complaint.” *Id.* The Ninth Circuit held that
12 under those facts, the district court properly granted summary judgment for the employer. *Id.*

13 The *Forrester* court focused its analysis on the FLSA’s definition of “employ,” which
14 “includes to suffer or permit to work.” *Id.* (quoting 29 U.S.C. § 203(g)). Those words mean “with
15 the knowledge of the employer.” *Forrester*, 646 F.2d at 414 (citation omitted). The purpose of this
16 knowledge requirement is to provide an employer with “an opportunity to comply with the
17 provisions of the FLSA.” *Id.* But that is not possible when an “employee fails to notify the
18 employer or deliberately prevents the employer from acquiring knowledge of the overtime work.”
19 *Id.* Where “the acts of an employee from acquiring knowledge,” such as the plaintiff’s claimed
20 uncompensated overtime hours, “the employer cannot be said to have suffered or permitted the
21 employee to work in violation of § 207(a).” *Id.* at 414-15.

22 The Ninth Circuit subsequently elaborated on the *Forrester* rule in a table opinion,
23 *Rackowski v. TC Construction Co., Inc.*, published at 1993 U.S. App. LEXIS 26257 (9th Cir. 1993)
24 (mem.). There, the court affirmed the district court’s ruling that an employer was not liable under
25 the FLSA for unreported time. *Id.* In reaching that conclusion, the Ninth Circuit rejected the
26 plaintiff’s contention that his employer had seen him perform the work for which he was seeking
27 compensation. It explained:
28

Although, as in *Forrester*, the employer in the present case might have seen Raczkowski while he was allegedly working on unreported time, the issue is whether the employer knew that the time was unreported. ***The relevant knowledge is not “I know that the employee was working,” but “I know the employee was working and not reporting his time....”*** In this case, Raczkowski has not adduced evidence that the employer knew that Raczkowski was failing to report overtime, so the district court correctly rejected this claim.

Id. at *3 (emphasis added).

Judge Siler, who was on the Ninth Circuit’s *Raczkowski* panel, subsequently authored a Sixth Circuit opinion that applied the *Forrester* rule and its elaboration in *Raczkowski*. See *White v. Baptist Mem’l Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012). In *White*, the employer hospital used an “exception log” requiring employees to document instances in which their meal break was interrupted by compensable work. *Id.* at 872. The plaintiff signed a document stating that she understood the policy and that she was required to record her time worked in an exception log to receive compensation. *Id.* The plaintiff admitted that when she completed the exception log, she was paid. *Id.* The plaintiff also told her supervisors and human resources periodically that she was not getting a meal break; however, she did not tell them that she was not being compensated for those missed meals. *Id.* The plaintiff eventually stopped completing the exception log, and did not use a procedure she knew about to correct any payroll errors. *Id.*

White rejected the plaintiff’s claim, which it found barred by *Forrester*. The court held that “[u]nder the FLSA, if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process.” *Id.* at 876. *Forrester* therefore imposes certain obligations on an employee seeking to recover alleged compensation under the FLSA:

[T]he employee bears some responsibility for the proper implementation of the FLSA’s overtime provisions. An employer cannot satisfy an obligation that it has no reason to think exists. And an employee cannot undermine his employer’s efforts to comply with the FLSA by consciously omitting overtime hours for which he knew he could be paid.

Id. (citation omitted). By failing “to follow the reasonable time reporting procedures” established by an employer, the employee “prevents the employer from knowing its obligation to compensate the

1 employee and thwarts the employer’s ability to comply with the FLSA.” *Id.* Because the plaintiff
 2 prevented the employer from knowing that she was not being paid for missed meal breaks, her FLSA
 3 claims failed. *Id.* Absent a viable claim under the FLSA, the plaintiff therefore could not serve as a
 4 representative for opt-in plaintiffs in the collective action. *Id.* at 877-78.

5 Other federal courts agree with the logic of the *Forrester* rule and have adopted it as a bar to
 6 FLSA recovery by law enforcement plaintiffs that fail to follow an employer’s reasonable
 7 procedures for reporting their time. *See, e.g., Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir.
 8 2017) (rejecting claim where police agency knew officers were working on mobile devices after
 9 hours but “did not know that such work was not being reported and paid”); *Hertz v. Woodbury Cty.*,
 10 566 F.3d 775, 781-82 (8th Cir. 2009) (constructive knowledge of overtime could not be imputed to a
 11 police department because police officers were “in the best position” to prove they were performing
 12 compensable work); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) (rejecting
 13 argument that city was responsible for confirming police officer accurately completed payroll forms,
 14 which improperly denied the city “the right to require an employee to adhere to its procedures for
 15 claiming overtime”); *Maciel v. City of Los Angeles*, 542 F. Supp. 2d 1082, 1090 (C.D. Cal. 2008)
 16 (“This Court, however, does not understand it is an employer’s burden to hold each employee’s hand
 17 and ensure that they take their breaks” to ensure compensation).

18 **2. Plaintiffs all knew about and acknowledged NDOC’s exception-based** 19 **system for reporting overtime**

20 The State of Nevada has a comprehensive regulatory system in place for overtime at NDOC.
 21 The overarching principle guiding the use of overtime within NDOC is for Wardens and Facility
 22 Managers “to ensure there is sufficient staff on duty to safely operate their institutions and facilities.”
 23 [SOF ¶¶ 1-5.]

24 Each Plaintiff is responsible for truthfully reporting the time they work, including all
 25 overtime. Specifically, “an employee shall provide an accurate accounting of the hours worked and
 26 leave used during a pay period in the NEATS Timekeeping System (“NEATS”), to include the
 27 specific times at which their shift starts and ends and regular days off.” Ex. A, A.R. 326.06(1).
 28

1 NEATS is an exception-based system, which assumes that an employee has worked all hours in their
2 scheduled shift, unless the employee has reported an exception. [SOF ¶¶ 6-7.]

3 If there is an exception because of overtime for a non-exempt employee, that employee
4 “must document this time on an Authorization for Leave and Overtime Request form (DOC-1000).”
5 Ex. A-2, A.R. 320.01(2). Employee exceptions are reported on timesheets, which the employee is
6 required to input and submit into NEATS “at the conclusion of each reporting cycle (pay period) no
7 later than 12 PM, Wednesday, of the non-pay week for each pay period.” Ex. A, A.R. 326.06(4).
8 Employees are subject to discipline under A.R. 339 if they falsify their timesheets. *See* Ex. A, A.R.
9 326.06(6). [SOF ¶¶ 8-10.]

10 Overtime eligibility depends on whether the employee has opted to work a standard or an
11 innovative workweek, using either a 40-hour or 80-hour variable. Overtime eligibility also depends
12 on whether the employee has elected to receive compensatory time, or “comp time,” in lieu of cash
13 wages for any extra hours worked. At one time or another, all seven of the named Plaintiffs have
14 worked on a variable (innovative) schedule, and six of the seven named Plaintiffs have agreed to
15 receive comp time instead of overtime. Plaintiffs have admitted they are not eligible for overtime
16 for claimed work time that falls under one of these exceptions. [SOF ¶¶ 11-18.]

17 All of the Plaintiffs have acknowledged on multiple occasions that they received, read, and
18 understood these procedures for reporting overtime. Their acknowledgments are well-documented
19 in: new hire checklists; receipts for their employee handbook; acknowledgments that they will “read
20 and familiarize” themselves with all regulations, including those pertaining to overtime and the
21 exceptions-based reporting system; their Employee Work Performance Standards Form, in which
22 they state they are proficient in all applicable rules and procedures; and their acknowledgment to the
23 same effect on each written appraisal they receive from NDOC. [SOF ¶¶ 19-25.]

24 **3. Plaintiffs admit they received comp time and were paid overtime when**
25 **they complied with NDOC’s exception-based reporting system**

26 Plaintiffs who opted into NDOC’s comp time system were given time off when they reported
27 that they worked longer than their scheduled shift. [SOF ¶¶ 26-29.]

1 In addition, nearly all of the collective action members took advantage of overtime
2 opportunities. Payroll data for 563 NDOC employees for the period of 12/31/2007 to 2/15/2016 was
3 analyzed and compared with timekeeping data entered into NEATS. Of the 555 Correctional
4 Officers in the data, 529 or over 95% recorded some overtime totaling 125,726.9 hours.” According
5 to that analysis, “the average total Overtime hours recorded was 226.5 hours,” with the top three
6 officers each reporting more than 2200 hours. The average total dollars paid in overtime was
7 \$7,746. “Across all [Correction Officer] periods, overtime was recorded on 10,904 of the 51,959
8 pay periods or 21.0%.” Every NDOC facility paid overtime. The reasons for the overtime varied
9 considerably between facilities and employees. [SOF ¶¶ 30-31.]

10 All seven of the named Plaintiffs were paid overtime, as shown by each Plaintiff’s Employee
11 Paycheck Analysis. All of the opt-in Plaintiffs who were deposed likewise were paid overtime. In
12 some cases, supervisors put in overtime requests for Plaintiffs, such as when overtime was incurred
13 as a result of responding to a security incident. For all other time, when Plaintiffs complied with
14 A.R. 320.01(2) by submitting an Authorization for Leave and Overtime Request Form (“Form DOC-
15 1000”), their requests were approved and they were paid for that overtime. [SOF ¶¶ 32-33, 38-39.]

16 For example, on May 20, 2014, Plaintiff Echeverria completed a Form DOC-1000 requesting
17 one quarter hour of leave after he apparently worked 15 minutes past his scheduled shift ending at
18 1:00 p.m. His request for overtime was approved. Similarly, “Plaintiff Walden received 15 minutes
19 of Overtime on November 26, 2010 and the timesheet note associated with the entry was
20 ‘HOLIDAY WORKED 15 MINUTES OF OVERTIME FOR BEING RELIEVED LATE.’”
21 Likewise, Plaintiffs Everist, Ridenour, and Tracy were approved for multiple instances of overtime
22 after submitting their Form DOC-1000s. What is particularly notable about the NEATS data is that
23 over ten percent of the segments recorded by Correctional Officers represented “time at or below an
24 hour in duration,” showing that even overtime of short duration was recorded. [SOF ¶¶ 34-37.]

25 Jason Hanski explained that NDOC’s process for reporting overtime is straight-forward:

26 Q: ...What’s the process to request overtime, as you understand it?

27 A: Well, there’s what they call DOC-1000, Department of Corrections Form
28

1000. That is utilized to file for overtime.

Q: Okay. And you're familiar with that process?

A: Yes.

Q: ...[I]s it fair to say you've used it many, many times in the past?

A: Well, every time you do overtime you have to have one filled out.

Q:So I don't hear any hesitation that you have in asking for it if you feel you're entitled to it?

A: *I'll ask for it if I feel I'm entitled to it, yes.*²²

Plaintiffs admit receiving overtime in most instances in which they have requested overtime by complying with NDOC's exception-based reporting system, using NEATS and the DOC-1000. [SOF ¶¶ 40-43.] Plaintiff Donald Riggs testified that he "always got paid for my time. Sometimes you were offered time off in lieu of being paid ... I always got my overtime.... I would file the Doc 1000 and turn it in to my supervisor.... *I have never seen a form that I turned in rejected.*"²³

4. Plaintiffs admit that they have not followed NDOC policy and have not submitted requests for overtime they claim they have not received

Plaintiffs who allege that they were not paid overtime admitted that it was because they failed to follow A.R. 320.01(2) by completing a Form DOC-1000. Many have never completed a DOC-1000 or otherwise reported overtime. What is especially startling is that several Plaintiffs have not reported overtime for even those activities that they admit are routinely paid: responding to security incidents and working past a scheduled shift time because of late relief. [SOF ¶¶ 44-47.]

Equally troubling, on the infrequent occasions when Plaintiffs have been denied overtime after submitting a DOC-1000, they have not complied with NDOC's administrative procedures in NAC Chapter 284 for appealing the denial – by either speaking to supervisors in their chain-of-command or by filing a grievance. That is true even for Plaintiffs like Travis Zufelt, who admitted

²² Ex. JJ, Hanski Dep., 121:6-16, 122:17-20 (emphasis added).

²³ Ex. P, Riggs Dep., 31:13-20, 33:5-15 (emphasis added).

1 that on the one occasion when his overtime request was denied, “after I argued with the supervisor of
2 why I wanted the overtime, then it wasn’t...”²⁴ [SOF ¶¶ 48-54.]

3 Plaintiffs offer a wide variety of excuses for not following NDOC’s overtime reporting
4 policy. Some, like Adrian Arias and Francisco Bautista maintain that they do not know the process
5 of reporting their overtime,²⁵ despite their written acknowledgments of receiving, reading and
6 understanding the procedures for doing so. [SOF ¶¶ 1-10.] Other explanations for not completing a
7 DOC-1000, like Donald Walden, Jr.’s, border on the absurd: “I don’t believe I did because, I mean,
8 it’s not like the NDOC 1000 states that your request is for pre-time. I mean, it’s strictly for
9 overtime.... How can I get overtime before my shift?”²⁶ Indeed, Walden contradicted himself when
10 asked why he did not seek overtime for an hour of pre-shift activities he completed when filling in
11 for a supervisor: “Don’t know” why he did not report it, “It’s a good question. I don’t know.”²⁷
12 Other Plaintiffs agreed that they “[d]on’t know” why they failed to report their overtime.²⁸

13 One of the most common excuses given by the Plaintiffs for not complying with NDOC’s
14 overtime reporting procedures is that it was, in the words of Travis Zufelt, “too much of a hassle.”²⁹
15 Daniel Tracy “didn’t want to hassle” with talking to his supervisor about an overtime request. Tracy
16 admitted that “...I should have, but ... I just wanted to get home. I ride a motorcycle to work, so I
17 know the ride home is going to be miserable because it was so hot out.”³⁰ Andre Natali did not
18 bother to report his overtime because “I’m not going to start a federal case over something small.”³¹

20 _____
21 ²⁴ Ex. FFF, Zufelt Dep., 118:1-119:3.

22 ²⁵ Ex. YY, Arias Dep., 63:2-5; Ex. HH, Bautista Dep., 56:21-23.

23 ²⁶ Ex. EEE, Walden Dep., 99:16-100:3.

24 ²⁷ Ex. EEE, Walden Dep., 71:18-72:3.

25 ²⁸ Ex. RR, Tremblay Dep., 28:17-21.

26 ²⁹ Ex. FFF, Zufelt Dep., 130:12-18; *see also id.* at 126:3-9.

27 ³⁰ Ex. VV, Tracy Dep., 79:4-80:16.

28 ³¹ Ex. FF, Natali Dep., 22:21-22.

1 Yet, this is precisely what Natali has done. He has made a federal case out of “something small,” to
 2 use his own words, all without reporting his time to NDOC as he is required to do.

3 Another excuse Plaintiffs give for not reporting overtime is that they were instructed that
 4 time that was *de minimis*, such as periods of less than six minutes, was noncompensable and could
 5 not be reported to NDOC.³² That would comport with federal law because “[m]ost courts have
 6 found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable,”
 7 particularly where it is administratively difficult to track the time. *Lindow v. United States*, 738 F.2d
 8 1057, 1062-64 (9th Cir. 1984). But even Darius Krol admitted this excuse was not true. He was
 9 specifically told that “you can actually write DOC 1000 by the minute.”³³

10 Some Plaintiffs have taken a different tack. A few contend that when they first started
 11 working for NDOC many years earlier, they were told not to request overtime.³⁴ Others say that
 12 they asked for overtime once, were denied – and did not grieve the issue or elevate it to other
 13 supervisors – and then never applied for it again.³⁵ One of the Plaintiffs, Terry Day, contradicted
 14 this testimony through his own personal knowledge and experience training new recruits. “[W]hen
 15 **they are staying over seven minutes or more after the end of their shift” they are told to submit an**
 16 **overtime request.** “I also instruct them to hold their shift commanders to task on those things.”³⁶
 17 Another, Jason Hanski, has no personal knowledge of any practice by NDOC to discourage its
 18 employees from reporting overtime, admitting, “I haven’t spoken directly to individual supervisors
 19 so much because it’s been a common practice in corrections.” However, **Hanski does have personal**
 20 **knowledge of one thing: he has not ever known anyone who requested overtime for pre- and post-**
 21 **shift activities who did not receive it.**³⁷

22 ³² Ex. AAA, Day Dep., 40:9-12; Ex. DDD, Krol Dep., 19:3-11; Ex. SS, Tyning Dep., 25:22-26:8.

23 ³³ Ex. DDD, Krol Dep., 19:3-11.

24 ³⁴ Ex. KK, Banks Dep., 18:1-19:1; Ex. BBB, Dicus Dep., 86:2-17; Ex. MM, Jones Dep., 32:2-24.

25 ³⁵ Ex. YY, Arias Dep., 29:20-30:19, 62:7-63:1; Ex. VV, Tracy Dep., 47:17-48:3, 55:5-22; Ex. SS, Tyning Dep., 19:19-
 26 20:1, 54:2-15.

27 ³⁶ Ex. AAA, Day Dep., 57:5-12 (emphasis added).

28 ³⁷ Ex. JJ, Hanski Dep., 123:18-124:19.

1 The wide variety of excuses Plaintiffs give for not reporting their overtime refutes any
 2 contention NDOC has some sort of “unwritten” policy to not pay them. The only common policy,
 3 plan, or scheme NDOC has is specified in the comprehensive regulatory system and administrative
 4 procedures establish by Nevada law, which Plaintiffs have acknowledged that they have received,
 5 read, and understand on numerous occasions throughout their employment. [SOF ¶¶ 19-25.]

6 **5. NDOC is entitled to summary judgment under *Forrester***

7 The undisputed facts, as stated above, establish that NDOC is entitled to summary judgment
 8 on Plaintiffs’ claims for overtime under the FLSA. NDOC’s exception-based system for reporting
 9 overtime is established under Nevada law, with comprehensive administrative regulations governing
 10 how time and attendance including overtime and compensatory time is to be reported. [SOF ¶¶ 1-
 11 18.] Such an exception-based system complies with the FLSA if it provides an opportunity to report
 12 exceptions such as overtime, as NDOC’s does. *See White*, 699 F.3d at 872-73.

13 On multiple occasions throughout their employment, including in their most recent work
 14 performance evaluations, Plaintiffs acknowledged that they received, read and understood all of
 15 NDOC’s administrative rules and procedures, including the procedure for reporting overtime
 16 through NEATS by documenting the claimed overtime through an Overtime Request Form DOC-
 17 1000. [SOF ¶¶ 6-10, 19-25.] When Plaintiffs followed this procedure, they admit that they were
 18 given compensatory time or paid overtime. [SOF ¶¶ 26-43.] If their overtime request is denied, for
 19 whatever reason, Nevada law provides an administrative procedure for them to grieve their
 20 compensation dispute, beginning with their supervisor. [SOF ¶¶ 48-50.]

21 The compensation Plaintiffs seek in this litigation is for overtime they admit they did not
 22 report to NDOC contrary to its policies and procedures [SOF ¶¶ 44-47.] and outside of the
 23 administrative grievance process. [SOF ¶¶ 51-54.] If they had reported time that was compensable,
 24 NDOC would have paid them. That is confirmed by the vast volume of overtime requests Plaintiffs
 25 did submit which NDOC approved, totaling an average of hundreds of hours of overtime for each
 26 Plaintiff. ***Over ten percent of all overtime NDOC approved was for a duration of one hour or less.***
 27 ***Several of the Plaintiffs’ files document receipt of overtime for small segments such as just fifteen***
 28

1 *minutes.* [SOF ¶¶ 30-37 (emphasis added).]

2 These undisputed facts fall squarely under the *Forrester* rule. “An employer must have an
3 opportunity to comply with the provisions of the FLSA.” 646 F.3d at 414. It is true that an
4 employer cannot “escape responsibility by negligently maintaining records required by the FLSA, or
5 by deliberately turning its back on a situation.” *Id.* But those narrow exceptions to the rule do not
6 apply here. This is not a case of NDOC negligently maintaining records. To the contrary, all of the
7 Plaintiffs admitted that they knew how to apply for and receive overtime pay, had done so in the
8 past, and were paid when they complied with NDOC’s system. [SOF ¶¶ 1-43.]

9 Second, far from turning its back on Plaintiffs’ overtime work, Plaintiffs acknowledged that
10 their own actions in not submitting their overtime requests, was responsible for the compensation
11 they are seeking in this litigation. [SOF ¶¶ 44-54.] Plaintiffs deliberately violated NDOC policy and
12 failed to report overtime they now claim is owed to them. They cannot circumvent that requirement
13 by denying NDOC “the right to require an employee to adhere to its procedures for claiming
14 overtime.” *Newton*, 47 F.3d at 749; *see also Thompson v. Pima Cty.*, 2009 U.S. Dist. LEXIS
15 140470, at **9-11 (D. Ariz. Mar. 30, 2009) (granting employer summary judgment on overtime
16 claim where the employee “deliberately prevent[ed] the employer from acquiring knowledge of the
17 overtime work” by failing to comply with county policy).

18 Third, the undisputed record evidence is that the nature of Plaintiffs’ FLSA theory is highly
19 variable. Plaintiffs’ testimony throughout this case has been that the time it takes to perform an
20 alleged task varies from a few seconds to a few minutes, as Timothy Carlman explained:

21 Q: Okay. So is it fair to say the least amount of time that it would take to
22 basically get through operations and to verify what my assignment was for the
23 day and to go out to the post would be three minutes?

24 A: Well, I can't swear to that too. If I'm not talking to two or three other
25 people, and you just come in and I look at you across the room and you're
26 squared away, I'll go, “Unit 12A,” and you can just go.

27 Q: So it could be a matter of seconds; is that fair?

1 A: It could be, yes.³⁸

2 Under such circumstances, Plaintiffs never explain how NDOC would have any way of knowing
3 when an employee works overtime without the employee's assistance. *The "reasonable diligence"*
4 *that Forrester requires an employer to exercise in its payroll practices "is not an expectation of*
5 *omniscience."* *Craig v. Bridges Bros. Trucking, LLC*, 823 F.3d 382, 389 (6th Cir. 2016) (emphasis
6 added). That is precisely why NDOC requires the Plaintiffs to use its comprehensive administrative
7 system to request overtime, which NDOC always paid. *See generally Newton*, 47 F.3d at 749 (an
8 employer has "the right to require an employee to adhere to its procedures for claiming overtime").

9 In conclusion, NDOC "cannot be said to have suffered or permitted the employee to work in
10 violation of § 207(a)." *Forrester*, 646 F.2d at 414-15; *accord Raczkowski*, 1993 U.S. App. LEXIS
11 26257 at *3. Accordingly, Plaintiffs have failed to prove their prima facie case, requiring entry of
12 summary judgment for NDOC on all of their FLSA claims. *See Forrester*, 646 F.2d at 414-15; *see*
13 *also Allen*, 865 F.3d at 944; *Hertz*, 566 F.3d at 781-82; *Newton*, 47 F.3d at 749; *Maciel*, 542 F. Supp.
14 2d at 1090.

15 **B. The undisputed facts show that NDOC has not knowingly and recklessly violated**
16 **the FLSA's overtime provisions**

17 Generally, there is a two year statute of limitations for claims under the FLSA. 29 U.S.C. §
18 255(a). That period can be extended to three years, but only if the claims arise out of a "willful
19 violation." *Id.* This Court cannot presume any conduct is willful in the absence of evidence.
20 *Alvarez*, 339 F.3d at 909. To prove willfulness, Plaintiffs must establish their employer acted in
21 "knowing or ... reckless disregard for the matter of whether its conduct was prohibited by the
22 statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (citation omitted). Plaintiffs
23 cannot meet their burden.

24 For the reasons explained already, NDOC's exception-based reporting system complies with
25 the FLSA. On multiple occasions throughout their employment, Plaintiffs admitted they had
26 received, read and understood the requirements for reporting overtime under that system. [SOF ¶¶ 6-

27 _____
28 ³⁸ Carlman Dep., Ex. O at 88:18-89:5.

1 10, 19-25.] When Plaintiffs followed this procedure, they concede they were paid overtime that they
2 earned. [SOF ¶¶ 26-43.] The only times that Plaintiffs were not paid overtime that they allege they
3 earned were when they violated NDOC's procedures for reporting it under NDOC's exception-based
4 system [SOF ¶¶ 44-47.] and took no action to raise their compensation issues with their supervisors
5 as required by Nevada's administrative grievance process. [SOF ¶¶ 51-54.] In other words, it was
6 the Plaintiffs who acted in "knowing or ... reckless disregard" for their overtime reporting
7 requirements under the policies and procedures that govern their employment, not NDOC.

8 Under these circumstances, in the unlikely event that any of Plaintiffs' FLSA claims survive
9 summary judgment on the various grounds asserted by NDOC in this and its other dispositive
10 motions, as a matter of law Plaintiffs cannot establish NDOC's actions were willful. *See SEIU Local*
11 *102 v. County of San Diego*, 60 F.3d 1346, 1355-56 (9th Cir. 1994). As such, the Act's default two
12 year limitations period applies. *See* 29 U.S.C. § 255(a).

13 For the same reasons, Plaintiffs are not entitled to liquidated damages, if any of their FLSA
14 claims remain. Pursuant to 29 U.S.C. § 260, double-damages under the Act are not to be awarded
15 "despite the failure to pay appropriate wages" where "the employer acted in subjective 'good faith'
16 and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the
17 failure did not violate the FLSA." *Alvarez*, 339 F.3d at 909. Where, as is the case here, the
18 undisputed facts show the absence of a willful violation, liquidated damages should not be awarded.
19 *See SEIU Local 102*, 60 F.3d at 1356.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 **IV. Conclusion**

2 For all of the foregoing reasons, NDOC respectfully submits that it is entitled to summary
3 judgment on the merits of Plaintiffs' FLSA claims, which should be dismissed with prejudice. In the
4 alternative, in the unlikely event any of those claims survive summary judgment, Plaintiffs have
5 failed to establish any proven violation was in knowing or reckless disregard of the Act's
6 requirements, precluding use of a three-year limitations period for willful violations and any award
7 of liquidated damages.

8 DATED this 8th day of April, 2020.

9 **WILSON ELSEER MOSKOWITZ**
10 **EDELMAN & DICKER LLP**

11 BY: /s/ James Tucker

12 James T. Tucker
13 Nevada Bar. No. (12507)
14 300 South 4th Street - 11th Floor
15 Las Vegas, NV 89101-6014
16 *Attorneys for Defendants The State of Nevada,*
17 *ex rel. its Department of Corrections*
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP and that on the 8th day of April, 2020, I electronically filed and served a true and correct copy of the foregoing **DEFENDANT STATE OF NEVADA EX REL. DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFFS' FLSA CLAIMS** to all parties on file with the CM/ECF:

Mark R. Thierman, Esq.
Joshua D. Buck, Esq.
Leah L. Jones, Esq.
THIERMAN BUCK LLP
7287 Lakeside Drive
Reno, NV 89511
Tel: 775-284-1500
Fax: 775-703-5027
Attorneys for Plaintiffs

Christian Gabroy, Esq.
Kaine Messer, Esq.
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, NV 89012
Telephone: (702) 259-7777
Fax: (702) 259-7704
Attorneys for Plaintiffs

By: /s/ Lani Maile
An Employee of WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP